Is the conduct of the student as stated by me in appearing for my former client, under the circumstances, and taking the steps indicated, contrary to any principles of professional ethics?

ANSWER:

In the opinion of the Committee, it contravenes proper professional ethics for an attorney to accept a retainer against his former employer involving matters of which he might have obtained knowledge while in such employment, and by reason thereof.

QUESTION:

A lawyer is consulted by a client about an alleged claim of the client, and the client, upon being advised that the claim is, in the opinion of the lawyer, unfounded or not enforcible, then so conducts himself that the lawyer concluded that he has reasonable ground for believing that his client, disappointed at the advice, will commit acts of violence against a member of his family against whom the disappointed client asserted his fancied claim, and the attorney knows that the disappointed client has in the past carried out similar threats against the same individual, and the attorney concludes that the client intends to carry out his renewed threats, and the attorney knows the person threatened, members of his family and his counsel. Is the attorney under any professional duty which would either require him to, or preclude him from, communicating the threats, or disclosing them, or taking such steps as seem to him reasonably calculated to prevent the person who consults him from accomplishing his threatened purpose of violence?

ANSWER:

The Committee does not consider that the privilege of professional confidence extends to such threats. It is not, therefore, in its opinion, unprofessional for the attorney to give warning.

PRINCIPAL AND SURETY—REMEDIES OF SURETY—CONTRIBUTION—In *Harris* v. *Jones*,[1] the maker of a promissory note applied to the defendant, Jones, to sign the note as surety. Jones refused to do so until the plaintiff Harris had first indorsed the note. Judgment being entered on the note Harris paid the payee in full and then brought suit against Jones for contribution. The Court held that as to the payee, Harris, and Jones were co-sureties, but as between themselves, the relationship of principal and surety existed, thus barring the former from any re-imbursement.

It is well settled that the right of a co-surety to enforce contribution does not depend upon contract[2], but upon the equity of the case. Contribution originally was enforceable only in courts of equity, but in later times courts of law assumed jurisdiction on the ground of an implied promise on the part of each joint-debtor or surety to contribute his share to make up the loss.[3] This right of contribution, which arises under the rule in equity apart from agreement between the co-sureties, may be varied by such agreement.[4] The relation in which co-sureties on a bill stand to the holder of the bill, has no bearing on the relation in which they

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[1] 136 N. W. Rep. 1080 (North Dakota, 1912).

[2] Lansdale v. Cox, 7 T. B. Mon. 401 (1828).

[3] Deering v. Earl of Winchelsea, 2 B. & P. 270 (1800); Powers v. Nash, 37 Me. 322 (1853).

[4] Swan v. Wall, 1 Chancery Reports, 534 (1641).

stand to each other. Co-sureties' liability towards one another is in reality an application of the old maxim that equality is equity. That the true relationship between the signers of the paper may be shown by parol evidence is practically universally acknowledged.[5] As a result, when it is shown that the second indorser was in the position of a supplemental surety, the nature of the relationship is one of contractual rather than of equitable rights.[6]

A supplemental surety's engagement extends to the other sureties' responsibility as well as to that of the maker. As between himself and the other sureties there is no mutuality.[7] His undertaking is to pay only in default of the principal and subsequent indorsers, since he incurs risk to the benefit of all the prior parties.[8] He is only a surety for a surety and as such is not liable to an action for contribution.[9]

Should the supplemental surety be called upon for payment by the creditor, he is entitled to his rights of subrogation.[10] He can recover from a surety, as well as from the principal, as all prior parties are principals to him.[11]

Thus it may be seen that the liability of co-sureties for contribution is an ancient right growing from an equitable principle to give equal justice to persons similarly situated,[12] while a supplemental surety's rights are contractual and place him on an entirely different footing than the other sureties.

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[5] Craythorne v. Swinburne, 14 Ves. 160 (1807), Easterly v. Barber, 66 N. Y. 433 (1876); Haddock v. Haddock, 192 N. Y. 439 (1908).

[6] Craythorne v. Swinburne, 14 Ves. 160 (1807); Lord Eldon: "Whether it depends upon a principle of equity or is founded in contract, it is clear, a person may by contract take himself out of the reach of the principle or the implied contract. That, after the principle of equity has been universally acknowledged, then persons acting under circumstances to which it applies, may properly be said to act under the head of contract, implied from the universality of that principle. .... But whether this stands upon contract or a principle of equity, it is clear that a party may take care by his engagement that he shall be bound only to a certain extent. .... If, therefore, by his contract a party may exempt himself from the liability or that extent of liability in which without a special engagement he would be involved, it seems to follow that he may by special engagement contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a surety, or only if the other does not pay; that is, as surety for the surety, not as co-surety with him."

[7] Monson v. Drakeley, 40 Conn. 563 (1873).

[8] Turner v. Danis, 2 Esp. N. P. C. 478 (1796).

[9] Cutler v. Emery, 37 N. H. 567 (1859); per the Court: "The principle on which one surety is regarded as liable as a principal to another surety is that a state of facts is shown to the Court from which it appears positively or by fair and reasonable inference that such surety intended to stand in the character of principal as to the subsequent signers."

[10] Sherman v. Black, 49 Vt. 198 (1876).

[11] Whitehouse v. Harison, 42 N. H. 3 (1860).

[12] Eisley v. Horr, 42 Neb. 3 (1894); Hartwell v. Smith, 15 Ohio, 200 (1864); per the Court: "This is a right arising from equity rather than from contract (except in so far as its universal recognition may make it an implied stipulation) and rests upon the ground that where the parties stand *in equali jure*, equity which delights in equality, will require that the discharge from the common obligation which inures to the equal benefit of all, shall be obtained at their equal expense."

Questions such as are raised in the principal case invariably depend largely upon the presence or absence of a number of facts apparently unimportant, but which considered as a whole are the turning points of the decision. The decision in the present case shows how closely the Courts will adhere to the fundamental principles and early doctrines of the common law, while at the same time keeping in accord with the Negotiable Instruments Act.[13]

W. A. W.

RIGHT TO CORPORATE DIVIDENDS—LIFE TENANT AND REMAINDERMAN—Two recent cases in Connecticut[1] and Massachusetts[2] illustrate the application of the rule that cash dividends, however large, are income and go to the life-tenant, while stock dividends, however made, are capital and go to the remainderman.[3] The corpus of the trust estate in each case consisted of shares in the same corporation, and both questions arose from the same dividend declaration. In neither case was the language of the testator sufficiently explicit of itself to govern the distribution. The D., L. & W. R. R. Co., a Pennsylvania corporation, invested part of its surplus earnings by subscribing for and taking the stock of the Lackawanna R. R. Co., a New Jersey corporation, whose line formed a cut-off between two points on the road of the Pennsylvania company, and so materially shortened its track. The Pennsylvania Company took a perpetual lease of the railroad and all other property of the New Jersey company, agreeing to pay by way of rental four per cent. per annum on the capital stock of the latter corporation. The D., L. & W. R. R. Co. then declared an extra dividend of thirty-five per cent. to its own shareholders payable in the stock of the Lackawanna R. R. Co.[4]

Both Courts decided that this dividend, although payable in the form of stock, in reality represented income, had all the characteristics of a cash dividend, and therefore belonged to the life-tenant. A true stock dividend, said the Massachusetts Court, does not diminish the property of the company, but by it each new share in the increased capital stock represents a smaller fractional interest in the total amount of the corporate property; on the other hand, a cash dividend out of profits diminishes the property of the company by exactly the amount so distributed, but does not lessen the fractional interest in the capital represented by each share. The Connecticut Court said that the stock thus distributed

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[13] R. C. 1905, Section 6366, 6370.

[1] Trust Co. v. Taintor, 83 Atl. Rep. 697 (Conn., 1912).

[2] Gray v. Hemenway, 98 N. E. Rep. 789 (Mass., 1912).

[3] For a full discussion of the various rules governing the distribution of corporate dividends, see note in University of Pennsylvania Law Review, Vol. 60, page 130 (1911–12).

[4] "Resolved, that an extra dividend of 35 per cent on the capital stock of the company be and is hereby declared payable by the distribution of the stock of the Lackawanna Railroad Company of New Jersey ...."